CHENG SUN CHUEN

v.

LEE CHEE SENG

HIGH COURT MALAYA, JOHOR BAHRU
MOHD. YUSOFF MOHAMED J
[DIVORCE PETITION NO. 37/80]
9 JULY 1983

FAMILY LAW: *Divorce - Petition for declaration of nullity of marriage - Wilful refusal to consummate marriage - Marriage contracted at Civil Registry of Marriages, Johore Bahru - After marriage, both petitioner and respondent lived in Singapore at different addresses - Petition does not state where parties were domiciled - Jurisdiction of Court to entertain proceedings - Whether Court has power to grant decree of nullity of a marriage - If parties did not reside in Malaysia at commencement of proceedings.*

The petitioner filed this Divorce petition for declaration of nullity of marriage, on the ground that the husband (respondent) had wilfully refused to consummate the marriage, that is, voidable marriage. Their marriage was contracted at the Civil Registry of Marriages, Johore Bahru on 13 October 1976. After the marriage, both the petitioner and the respondent were reported to have lived in Singapore, each at different addresses. The petition did not state where the parties were domiciled. The petition was adjourned for the petitioner's previous Counsel to comply with the necessary requirements. However, Mr. Anantham the new Counsel for the petitioner wrote to the Court that the petition be re-scheduled for hearing on the original petition and the Court accordingly set the petition for hearing. At the hearing, Mr. Anantham relied solely on s. 4(2) of the Divorce Ordinance, 1952 and said that since both requirements of the section have been complied with, in that, a marriage was purported to be monogamous and that it was celebrated in the Federation, the Court itself had no discretion but to entertain the application. Domicile was not in issue.

Held:

[1] Section 4(2) of the Divorce Ordinance, 1952 does not authorise the Court, as it is clearly stated therein, to grant decree of nullity. It merely limits or restricts the powers of the Court in situations specified in the section.

[2] Before the Court can entertain the present proceedings, the petitioner must first establish the Court's jurisdiction in that either of the parties was domiciled in the Federation at the date when the proceedings were instituted. Or to establish that she was ordinarily resident in the Federation for a period of 3 years immediately before the petition was filed pursuant to s. 49 (1)(b) of the Divorce Ordinance, 1952. These were not done.

[3] With the passing of the new Law Reform (Marriage and Divorce) Act, 1976, effective from 1 March 1982, the Courts cannot under s. 67 of the Act grant a decree of nullity of a marriage unless both the parties to the marriage reside in Malaysia at the time when the proceedings were commenced.

[Petition dismissed.]

Case referred to:
John Kershaw Tattersall Pickup v. Bertha Florence Pickup Otherwise Godfrey [1946] 3 MLJ 35

Legislation referred to:
Divorce Ordinance 1952, ss. 3, 4(2), 49(1)(b)
Law Reform (Marriage and Divorce) Act 1976, s. 67

For the petitioner - K. Anantham; M/s. Skrine & Co.

JUDGMENT

Mohd. Yusoff Mohamed J:

In this petition for declaration of nullity of marriage, the question that arises is one of jurisdiction of this Court to grant the decree sought by the petitioner. The ground of the petition is that the husband (respondent) had wilfully refused to consummate the marriage, that is, voidable marriage.

Their marriage was contracted at the Civil Registry of Marriages at Johore Bahru on 13 October 1976. After the marriage, both the petitioner and the respondent were reported to live in Singapore though each at different addresses until the date of this petition.

The petition does not state where the parties were domiciled and upon this ground the petition was first adjourned for the petitioner's previous Counsel to comply with the necessary requirements. Because of this, the petitioner after the adjournment changed her Counsel and consequently one Mr. Anantham wrote to the Court that the decision of the previous Counsel to amend the petition was made erroneously and he requested that the petition be re-scheduled for hearing. This was complied with by the Court.

At the hearing Mr. Anantham, as in his letters to the Court, relied solely on s. 4(2) of the Divorce Ordinance 1952 and said that since both requirements of the section have been complied with in that a marriage was purported to be monogamous and that it was celebrated in the Federation, the Court itself has no discretion but to entertain the application. Domicile was not in issue.

Section 4(2) of the Ordinance provides:

> (2) Nothing herein shall authorise the Court to make any decree of nullity of marriage except-
>
> (a) where the marriage between the parties was contracted under a law providing that or in contemplation of which marriage is monogamous; and
>
> (b) where the marriage to which the decree relates was celebrated in the Federation.

This s. 4 (2) does not authorise the Court, as it is clearly stated therein, to grant decree of nullity. It merely limits or restricts the powers of the Court in situations specified in the section. The powers of the Court to grant such relief are as provided in s. 3 of the Ordinance. That is:

> to give relief on principles which in the opinion of the Court, as nearly as may be, conformable to the principles on which the High Court of Justice in England acts and gives relief in matrimonial proceedings.

It is a basic principle in the English Court that it has jurisdiction to entertain proceedings for nullity of marriage if (and only if) either of the parties is domiciled in England and Wales on the date when the proceedings are begun or was habitually resident in England and Wales for one year ending with that date - see Rayden on *Divorce* 12th Edn. @ 74.

Now s. 4(2) of our Divorce Ordinance 1952 is in *pari materia* with Divorce Ordinance Cap. 84 of the Straits Settlements. In the case of *John Kershaw Tattersall Pickup v. Bertha Florence Pickup Otherwise Godfrey* [1946] 3 MLJ 35, McElwaine CJ in similar application for nullity on the ground of impotency held:

> The Courts of the Colony have no power to give a decree of nullity of marriage based on impotence unless the parties are domiciled in the Colony ...

and in respect of s. 4(2), he said:

I am aware that s. 4 Sub-section 1 of the Divorce Ordinance mentions domicile in connection with dissolution, and that s. 4(2) does not mention domicile, but as Bateson J points out at p. 41 of the report of the *Inverclyde* case: 'Nullity on the ground of impotence is a suit to avoid a marriage and is in essence a suit to dissolve it'. **I think the same remark applies to nullity on the ground of refusal to consummate.**

(Emphasis supplied).

In my view, before the Court can entertain the present proceedings, the petitioner must first establish the Court's jurisdiction in that either of the parties is domiciled in the Federation at the date when the proceedings were instituted. Or if she wishes to take advantage of the provision of s. 49(1)(b) of the Divorce Ordinance 1952, to establish that she was ordinarily resident in the Federation for a period of 3 years immediately before the petition was filed. These have not been done.

Now, with the passing of the new Law Reform (Marriage and Divorce) Act 1976, my view is fortified in that with effect from 1 March 1982, the Courts cannot under s. 67 of the Act grant a decree of nullity of a marriage unless both the parties to the marriage reside in Malaysia at the time when the proceedings were commenced.

Upon these grounds, this petition is dismissed.

Also found at [1983] 2 CLJ 86